Petition

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81-690

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN JOSEPH CERRELLA

Petitioner-Appellant

VS

THE UNITED STATES OF AMERICA

Respondent-Appellee

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION OF PETITIONER-APPELLANT

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QUESTION PRESENTED FOR REVIEW

The U.S. Court of Appeals for the Fifth Circuit affirmed the decision of the District Court, and the question presented is whether or not the U.S. District Court, Northern District of Georgia erred and violated due process of law and constitutional rights against cruel and unusual punishment in denying Habeas Corpus relief and in refusing to give Petitioner credit for One Thousand Eighty Three (1,083) days (12 days short of three (3) years) against his sixteen (16) year sentence, the Petitioner during said period exhausting appellate processes but by Order of the Trial Court, was among other things, required and did report daily during the week in person to the United States Probation Office in Ft. Lauderdale, Florida, between the hours of 9:00 a.m. and 3:00 p.m., and on the weekends report by phone to the duty officer in the probation office at a number to be supplied to the

Petitioner on the last business day of each week, it being the contention of Petitioner that under the constitutional right to due process of law, as well as the prohibition against cruel and unusual punishment and right to custody credit;due to his compliance with the Trial Court ordered highly restrictive of freedom and movement requirements for a period of One Thousand Eighty Three (1,083) days during exhaustion of appellate process, he is entitled to credit for said time against his sixteen (16) year sentence he is now serving. (Respondent has computed appellate time as One Thousand Eighty Nine (1,089) days.

In other words,after sentence and before the Petitioner began service of same, the Trial Court also inflicted punishment for One Thousand Eighty Three (1,083) days as a condition for partial freedom during exhausting of appellate processes. At what point do restrictions of freedom and movement pursuant to 18 U.S.C. Sec. 3146 become incarceration and punishment

for which a defendant should receive credit a-

gainst jail sentence time?

PARTIES

JOHN JOSEPH CERRELLA, Petitioner-Appellant

THE UNITED STATES OF AMERICA, Respondent-Appellee

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit was dated July 13, 1981 and was reported and appears in the Appendix hereto. No Opinion was rendered by the United States District Court for the Northern District of Georgia. (Appendix 24-25-26)

GROUNDS FOR JURISDICTION

The Petitioner was charged with attempted extortion in violation of Title 18 U.S.C. Sec. 1951 and 2, tried by jury and convicted on September 4, 1975, and appellate processes were ex-

hausted by U. S. vs Chiantese and Cerrella, 546 F2d, 135, 136 (5th Cir. 1977), U. S. vs Chiantese and Cerrella, 560 F2d 1244 (5th Cir. 1977), U. S. vs Chiantese and Cerrella, 582 F 2d 974 (5th Cir. 1978), U. S. vs. Chiantese and Cerrella, 587 F 2d 508 (5th Cir. 1978), Cerella and Chiantese vs U. S. 99 S. Ct. 2030, Cert. denied April 23, 1979. Petition for Writ of Habeas Corpus demanding credit for One Thousand Eighty Three (1,083) days restriction during appellate process exhaustion was filed in the U. S. District Court, Northern District of Georgia, April 23, 1980, and dismissed on December 31, 1980 with Judgment for Respondent. This Judgment was appealed to U. S. Court of Appeals for the Fifth Circuit and on July 13, 1981 this Judgment was affirmed. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner-Appelant relies on the provisions of the VIII Amendment of the Constitution

of the United States, 18 U.S.C. Sec. 1254 and 18 U.S.C. Sec. 3146, these relating to due process of law, cruel and unusual punishment, jurisdiction of this Court and Release in Noncapital Cases Prior to Trial, with texted thereof contained in the Appendix herewith.

STATEMENT OF THE CASE

The Petitioner was charged with attempted extortion in violation of Title 18 U.S.C. Sec. 1951 and 2, was tried before a jury and convicted on September 4, 1975. The Court without benefit of pre-sentence investigation (Not required by law at that time) immediately sentenced Petitioner, who has no previous conviction record, to sixteen years imprisonment. Appellate procedure was begun, however due to excessive bail requirements (cash bond in the amount of $150,000), Petitioner was confined from September 4, 1975 through January 21, 1976, a total of four months and seventeen days. Then, through the intervention of the United States

of Appeals for the Fifth Circuit, surety appeal bond in the amount of $150,000 was set and made. On January 15, 1976, the trial court pursuant to Title 18 U.S.C. Sec. 3146 ordered that the Petitioner comply with the following extremely restrictive of freedom and movement requirements:

1. No travel permitted outside the jurisdiction limits of Dade, Broward, and Palm Beach Counties without written permission of the Court.

2. Surrender passport or other travel documents.

3. Petitioner not permitted in or at any public or private airport or other flying facility nor travel on the waterways of the Atlantic Ocean.

4. Avoid contact with the alleged victim, his family or close personal friends or with Terry Noble, his family or close personal friends, Stan Stratton, Stan's Lounge or any establishment where Florida Parking Kings had a parking

franchise, the government to furnish names of such franchises.

5. No contact with anyone connected with ownership or management of Bocaccio's, Oakland Park, Florida.

6. Petitioner to report daily in person to the United States Probation Office in Ft. Lauderdale, Florida between the hours of 9:00 a.m. and 3:00 p.m. and on the weekends report by phone to the duty officer in the probation office at a number to be supplied to the Petitioner on the last business day of each week. (Emphasis added)

7. Petitioner not permitted the possession of firearms or other deadly weapons.

8. Petitioner to avoid association with any convicted felon on list to be supplied by the government. (R-13-15)

The appellate processes were exhausted while under these extremely restrictive custody requirements as outlined under Grounds For Jurisdiction caption supra, and pursuant to Federal Rules of

Criminal Procedure No. 35, Motion for Mitigation of Sentence was filed and same denied September 22, 1979. The Court ordered restrictive non-incarceration custody for 1,083 days was a part of said motion. Heretofore on August 1, 1979, Petition for Writ of Habeas Corpus was filed, and on February 25, 1980, same was dismissed by the Court without prejudice to Petitioner's right to again file after exhaustion of administrative remedies. On January 14, 1980, Petitioner implored the United States Bureau of Prisons for credit for 1,083 days credit against his current sentence, service being perfected on Honorable Benjamin R. Civiletti, Attorney General, United States of America, Honorable Norman A. Carlson, Director of U.S. Bureau of Prisons, Honorable Wade H. McCree, Jr., Solicitor General of the United States of America, brief was also submitted and on April 1, 1980, Honorable Glenn E. King, Regional Administrative Systems Manager, U. S. Department of Justice,

Federal Prison System, Southeast Regional Office, declined to give petitioner credit for 1,083 days against his present sentence of sixteen (16) years. (The Respondent has computed the appellate period as One Thousand Eighty Nine (1,089) days).

On April 23, 1980, John Joseph Cerrella, Petitioner-Appellant, filed petition for Writ of Habeas Corpus alleging that prior to beginning service of his sixteen (16) year sentence and during appellate proceedings exhaustion the Trial Court (U.S. D.C. S.D. Fla.) subjected him to restrictive non-incarceration custody for a period of One Thousand Eighty Three (1,083) days in violation of Constitutional right against cruel and unusual punishment and that he should have credit for One Thousand Eighty Three (1,083) days against said sentence in that he was required among other things, to report in person daily on week days to the U.S. Probation Officer, and make weekend daily telephone contact

and comply with travel and social restrictions (R3-82). The U. S. Migistrate ordered that the Respondent-Appellee respond (R 83.). The Respondent responded (R 84-120) alleging that Petitioner-Appellant was not entitled to credit of one thousand eighty three (1,083) days against his sixteen (16) year sentence and Habeas Corpus relief. Petitioner-Appellant responded to this response (R-121-123). The U. S. Magistrate filed Report and Recommendation (R-124-127) recommending the Petitioner's motion for Writ of Habeas Corpus be dismissed. Petitioner-Appellant objected to Magistrate's Report and Recommendation (R 128-130). Respondent-Appellee filed Brief in support of Magistrate's Report and Recommendation (R131-138). On December 31, 1980, the Court directed the Clerk to enter judgment for Respondent-Appellee dismissing Petition for Writ of Habeas Corpus, and on the same date Judgment was so entered (R139-140). On January 14, 1981, Notice of Appeal was filed. The Record on Appeal was filed February 24, 1981.

The United States Court of Appeals for the Fifth Circuit on July 13, 1981, affirmed the judgment of the lower Court in the denial of Habeas Corpus relief to Petitioner.

The Petitioner-Appellant complied with the unheard of and unparralled restriction of freedom and movement requirements for One Thousand Eighty Three (1,083) days (R-17-57), and through Habeas Corpus proceedings, has sought to get credit of One Thousand Eighty Three (1,083) days against his sentence, and the Court has denied same. (Respondent has computed appellate period as One Thousand Eighty Nine (1,089) days.

BASIS FOR FEDERAL JURISDICTION

28 U.S.C. 1254 provides the cases in the Court of Appeals may be reviewed by Supreme Court by Writ of Certiorari granted on Petition of any party to any Civil or Criminal case before or after judgment.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES DUE PROCESS OF LAW AND VIOLATION OF NOT TO INFLICT CRUEL AND UNUSUAL PUNISHMENT RIGHTS AND IN ISSUE ARE A TOTAL IF One Thousand Eighty Three (1,083) days (Respondent has computed it as One Thousand Eighty Nine (1,089) days.

The Petitioner is not challenging the validity of the pronounced Sixteen (16) year sentence. The Petitioner is requesting credit of One Thousand Eighty Three (1,083) days against said sentence. The Trial Court, in addition to the Sixteen (16) year sentence which was then not being served by the Petitioner, in actuality, during the aforesaid period and while appellate proceedings were being exhausted illegally through restriction of liberty requirements, sentenced Petitioner to terms much more harsh than parole, probation, conditional release, or even

imprisonment through illegal abuse of judicial discretion under 18 U.S.C. 3146. In the denial of Rule Thirty Five motion, the Trial Judge set forth in the order that the Petitioner should serve every day of the Sixteen (16) year sentence.

The restriction of the personal liberty of the Petitioner during the exhaustion of appellate proceedings is of a magnitude unknown to cases now on record, and so cruel, harsh, and unusual as to violate constitutional dictates. It is the contention of the Petitioner that the restrictions of his personal liberty here involved legally amounted to illegal imprisonment, albeit an amiliorated form thereof, Anderson vs Corall, 263 U.S. 193, 44 St. Ct.43, 68 LEd. 247: Jenkins vs Madigan, 211 F2d, 904 cert. denied, 348 U.S. 842, 75 S. Ct. 63, 99 LEd. 664. When an individual's liberty is restrained by the action of an officer of the United States having authority to exercise restraint, such

individual is entitled to credit for the period of that restraint towards service of his sentence, U.S. vs. O'Brien 273 F2d 495, Smith vs. Swope 91 F2d 260, Albori vs U.S. 67 F2d 4, White vs Pearl man 42 F 2d 788, Price vs McGuinness 269 F 977, U.S. vs Jones 147 Fed. Supp. 268, In. Re.Jennings 188 F 479, Shaughnessy vs U. S. 345 U.S. 206,213 (1953).

What is custody? What is incarceration? What is imprisonment? There is vast authority for the meaning of the word custody in the cases that support Habeas Corpus actions. Why should not these same interpretations apply to pre-incarceration under sentence (appealed) limitations on liberty, freedom and movement and result in credit against a sentence later served? When does custody not amount to incarceration and imprisonment?

For purposes of Habeas Corpus proceedings, Lord Mansfield had no difficulty with the sufficiency of the restraint when a man on behalf of an eighteen year old girl brought Habeas Corpus proceedings.

See Rex vs Delaval, 3 Barr. 14341 (Kings Bench Cranch C. C. 662 (D C.C.C. 1839) where Lord Mansfield in a Habeas Corpus case involving limited restraint of a young lady discharged her from all restraint. For an alien case, see Shaughnessy vs U.S., 345 U. S. 206, 213 (1953). Custody is sufficient even to attack a sentence not yet being served, Walker vs Wainwright, 390 U.S. 335, 336-37 (1968). Parole is custody, Jones vs Cunningham, 371 U.S. 236, (1963), probation is custody, Benson vs California 328 F 2d 159 (Ninth Circuit, 1964). Selective Service induction notice is constructive custody of the U. S. Government, Ex parte Fabiani, 105 F 964, (1905). In an old Texas case, a man was committed to jail but the Sheriff permitted him to go home to care for a sick child on his promise that he would not leave his home or office, this was custody, see Ex parte Snodgrass 43 Texas C.R. 359, 65 S.W. 1061 (1901) and Ex parte Foster 44 Texas C.R. 324, 71 S.W. 593 (1903). In the case of United States of America ex rel L. B. Binion vs William A. O'Brien,

USM, 273 F2d 493, it was held that where convict having no duty to report and under no restraint other than that imposed on one released on bail was nevertheless required to report by probation officer clothed with the apparent authority to do so, convict was entitled to credit on his sentence for period he was subjected to supervision by federal probation officer while on bail from sentence. Would not court ordered extremely restrictive of freedom and movement requirements slso authorize credit for the custody period involved. See Howie vs Byrd, 396 F. Supp. 117.

It is the contention of the petitioner that although petitioner was not physically incarcerated from January 22, 1976 through January 4, 1979 (1,083 days) during exhaustion of appellate procedures, the terms of his release as laid down by the Court and his compliance therewith, amounted to custody for which petitioner should receive credit against his sentence of sixteen (16) years.

The Respondent-Appellee relies on Hensley vs

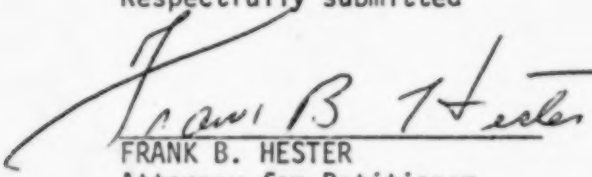
Municipal Court, supra, Cochran vs United States, 489 F 2d 691,692-693 (5th Cir. 1974) and Polakoff vs United States, 489 F2d 727, 730 (5th Cir. 1974). In Hensley vs Municipal Court supra, the Supreme Court of the United States held that a criminal defendant released on his own recognizance pending execution of sentence following conviction was in "custody" within the meaning of the federal Habeas Cropus statute, 28 U.S.C. Secs. 2241 (c) (3) and 2254 (a). In Cochran vs United States supra, holds that custody as set out in Hensley is not custody to be recognized under 18 U.S.C. Sec. 3568. Polakoff vs United States-supra, has to do with a case wherein that Appellant maintained that 18 U.S.C. Sec. 3568 should allow credit against sentence for time "in custody" when he was free under bond under travel and social restrictions, and was required to report weekly to a probation officer. Factually, there is no comparison or parallel to the facts in instant appeal. Two Hundred and Three (203)

days (weekly report to a probation officer) credit against sentence in the Polakoff vs United States surpa, factually has no similarity to the aggravated facts in instant appeal. Just how far can a District Court Judge go in limiting and restricting the freedom of movement of a defendant under 18 U.S.C. 3146 without inflicting cruel and unusual punishment, and violating due process of law? The Petitioner in instant case, among other things, was required to report each week day in person, to a United States Probation Officer, and telephonically report each day on the weekend for a period of One Thousand Eighty Three (1,083) days. When does restriction of freedom and movement become incarceration and imprisonment? Is there no limit to the restriction of freedom and movement that a Federal District Judge can place on a defendant released on bond, and exhausting appellate processes?

CONCLUSION

The Petitioner submits that this petition raises a substantial question of constitutional violation of due process of law and right against infliction of cruel and unusual punishment, and for the reasons set forth heretofore, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit dated July 13, 1981.

Respectfully submitted



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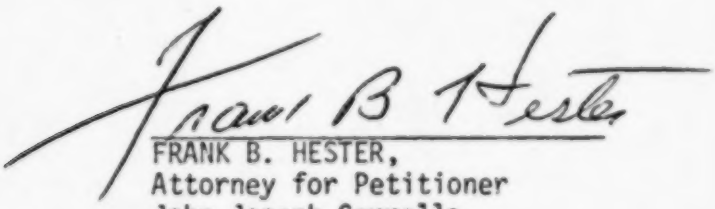
CERTIFICATE OF SERVICE

This is to certify that I have this day served the office of the United States Attorney

for the Northern District of Georgia, Richard Russell Building, 75 Spring Street, S. W., Atlanta, Georgia 30303, and the Solicitor General of the United States of America, Washington D. C. 20013 with the within Petition For Writ of Certiorari by mialing them a copy of same in a properly addressed envelope with postage prepaid.

This 5th day of October, 1981.



FRANK B. HESTER,
Attorney for Petitioner
John Joseph Cerrella

John Joseph CERRELLA, Petitioner,

v.

Jack HANBERRY, Warden, Respondent.

No. 81-7064
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit B

July 13, 1981.

The United States District Court for the Northern District of Georgia at Atlanta, William C. O'Kelley, J., dismissed federal prisoner's petition for writ of habeas corpus, and he appealed. The Court of Appeals held that: (1) restrictive conditions of prisoner's appellate bail did not constitute custody for which he should be given credit against sentence he received from district court, and (2) 16-year sentence imposed upon prisoner for violation of statute, under which maximum permissible sentence is 20 years, was not grossly disproportionate to offense committed.

Affirmed.

1. Criminal Law ⇐1216(1)

Definition of "custody" as it is used in habeas corpus proceedings when prisoner attempts to attack his conviction is not equatable with "custody" for purpose of credit to be given prisoners for time previously served while their case was pending ultimate resolution, and thus restrictive conditions of prisoner's appellate bail, which restricted his travel and required surrender of his passport and avoidance of contact with victim, his family or close personal friends, did not constitute "custody" for which he had to be given credit against district court's sentence. 28 U.S.C.A. § 2241.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1213

Among standards for finding punishment violative of Eighth Amendment are whether conditions of confinement shock court's conscience, whether sentence imposed is grossly disproportionate to offense, or whether sentence imposed offends evolving notions of decency. U.S. C.A.Const. Amend. 8.

3. Criminal Law ⇐1213

Defendant's sentence of 16 years for violation of statute, under which maximum permissible sentence is 20 years, was not grossly disproportionate to offense committed in light of facts surrounding commission of offense, and thus sentence imposed did not constitute cruel and unusual punishment. 18 U.S.C.A. §§ 2, 1951; 28 U.S.C.A. § 2241; U.S.C.A. Const. Amend. 8.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, FRANK M. JOHNSON, Jr., and HENDERSON, Circuit Judges.

PER CURIAM:

John Joseph Cerrella appeals from a dismissal of his petition for writ of habeas corpus in which he attacks upon two bases the sentence he is now serving.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Cerrella is a federal prisoner incarcerated by the Attorney General of the United States pursuant to a 16-year sentence imposed upon him in 1975 by the United States District Court for the Southern District of Florida, following his conviction by jury for violations of 18 U.S.C.A. §§ 2, 1951. Petitioner brings his habeas corpus petition pursuant to 28 U.S.C.A. § 2241 alleging that: (1) he should receive credit on his current sentence for the time served while on bond during his appeal and that the terms and conditions of his release on bond constituted "custody" and (2) the sentence imposed upon him constituted cruel and unusual punishment within the meaning of the Eighth Amendment because the length of the sentence was grossly disproportionate to the offense.

[1] Cerrella's first argument is that the restrictive conditions of his appellate bail constituted custody for which he should be given credit against the sentence he received from the district court. These restrictions included no travel outside the jurisdictional limits of Dade, Broward, and Palm Beach Counties without written permission of the court; the surrender of his passport or other travel documents; denial to be permitted in or at any public or private airport or other flying facility or to travel on the waterways of the Atlantic Ocean; avoidance of contract with the victim, his family or close personal friends and avoidance of contact with anyone connected with ownership or management of a certain business establishment in Oakland Park, Florida. Further, petitioner was required to report daily in person to the United States Probation Officer in Ft. Lauderdale, Florida, and on weekends report by phone to the duty officer in the Probation Office.

The facts of the extortion crime for which Cerrella was convicted were stated by this Court in *United States v. Chiantese*, 582 F.2d 974 (5th Cir. 1978), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979), as follows:

> Chiantese and Cerrella owned one [parking] service, and the other was owned by Mark Parnass, the chief Government witness. The evidence adduced at trial indicated that the defendants had repeatedly threatened Parnass in an attempt either to force him to join in a "partnership" with them or to get out of the parking lot business. Parnass testified that Cerrella told him to pay one third of his business profits to Cerrella or go out of business. He also testified that Cerrella threatened that he and Chiantese knew where Parnass and his family lived and that "we will hurt you if we have to." ... Additionally, a tape recording of a conversation between Parnass and Cerrella, which had been made by means of a transmitter placed on Parnass, was played for the jury. During that conversation, Cerrella told Parnass to get out of the parking lot business, "Or I'm gonna put you in a box." ... The recording also contained the following statement by Cerrella: "I ain't coming back with another deal .... [Y]ou can tell the Feds, you can tell the ..... local cops. I'll put you in the ..... hospital, you'll come out and know I did it and I'll put you in again."

Id. at 978 (footnote and references to record omitted).

Petitioner's attempt to extend *Hensley v. Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973), to include the situation he now presents to this Court is misplaced. *Hensley* did not equate the definition of "custody" as it is used in

habeas corpus proceedings when a prisoner attempts to attack his conviction and "custody" for the purpose of "credit to be given prisoners for time previously served while their case [was] pending ultimate resolution." *Cochran v. United States*, 489 F.2d 691, 692-93 (5th Cir. 1974); *see Polakoff v. United States*, 489 F.2d 727, 730 (5th Cir. 1974). Thus, this issue as presented by Cerrella has been decided by this Circuit contrary to the position Cerrella advances.

Cerrella's second contention to the effect that the sentence imposed upon him was cruel and unusual punishment within the meaning of the Eighth Amendment because it was grossly disproportionate to the offense committed by petitioner is also without basis. The sentence imposed upon Cerrella was less than the statutory maximum penalty. Under such circumstances this Circuit has held that, when a term of imprisonment imposed in a sentence is less than the statutory maximum penalty, the sentence does not constitute cruel and unusual punishment. *United States v. Ruacho-Acuna*, 440 F.2d 1199 (5th Cir. 1971).

[2, 3] Among the standards in this Circuit for finding a punishment violative of the Eighth Amendment are: (1) whether the conditions of confinement shock the Court's conscience; (2) whether the sentence imposed is grossly disproportionate to the offense; or (3) whether the sentence imposed offends evolving notions of decency. *Newman v. Alabama*, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975). Furthermore, even if a disproportionality analysis were to be applied in this case, the offense for which Cerrella was convicted and sentenced and the facts surrounding the commission of the offense, some of which are set out above, reflect that the sentence imposed was not in fact disproportionate. *See Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

Thus, Cerrella's sentence of sixteen years for violation of 18 U.S.C.A. § 1951, under which the maximum permissible sentence is twenty years, where the commission of the offense was in the manner herein reflected, was not grossly disproportionate to the offense committed.

Accordingly, the district court's denial of the petition for the writ of habeas corpus is AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal question presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for

decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

Best Copy Available

APPENDIX contd.

§ 3146. Release in non-capital cases prior to trial

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his first appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives such assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court in cash

Ch. 207 RELEASE 18 § 3146

or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

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APPENDIX contd.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after a specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided*, That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

Added Pub.L. 89-465, § 3(a), June 22, 1966, [illegible] Stat. 214.